SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shaw* [2017] QCA 38
PARTIES:	**R** **v** **SHAW, Melissa Leigh** (appellant)
FILE NO/S:	CA No 124 of 2016 SC No 376 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 20 April 2016
DELIVERED ON:	17 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2016
JUDGES:	Fraser and Morrison and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – AID, ABET, COUNSEL OR PROCURE – KNOWLEDGE – where the appellant was found guilty by a jury of assault occasioning bodily harm whilst armed and murder – where the deceased was the fiancé of the appellant – where the deceased had been violent towards the appellant during the course of their relationship – where the appellant was in a romantic relationship with the person who committed the offence – where that person had previously assaulted the deceased – whether the appellant and the person responsible for the deceased's death formed the common intention to cause some serious violence to the deceased – whether the verdict of guilty on the count of murder was unreasonable *Criminal Code* (Qld), s 7(1)(b), s 7(1)(c), s 8, s 300, s 302 *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *R v Hillier* (2007) 228 CLR 618; [2007] HCA 13, cited *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited
COUNSEL:	J Hunter QC for the appellant

M R Byrne QC, with D R Kinsella, for the respondent

SOLICITORS: Jacobson Mahony Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was found guilty by a jury of assault occasioning bodily harm whilst armed and murder. She has appealed against conviction upon the ground that, "The verdict of guilty on the count of murder is unsafe and unsatisfactory in all of the circumstances, in that it is unreasonable."

[2] The ground that a verdict of guilty is unreasonable requires the Court to conduct an independent assessment of the sufficiency and quality of the evidence at the trial and decide whether upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence charged against her.[1] (The appellant did not contend that the guilty verdict was "unsafe" or "unsatisfactory" if it was not unreasonable.)

Outline of the evidence

[3] The victim of both offences was Shyam Dhody. Dhody was a businessman. He was bankrupt but effectively controlled the company which marketed investment properties, although the appellant was recorded as the company's sole director.[2] At the time of the offences Dhody lived with the appellant and they were engaged. Unknown to Dhody, the appellant was in a relationship with one Gooley. Dhody had been violent towards the appellant during the course of their relationship. Uncontroversial evidence established a very strong case that on 26 March 2013 Gooley unlawfully assaulted Dhody with a crowbar, occasioning him bodily harm, and on 5 July 2013 Gooley unlawfully killed Dhody by repeatedly shooting him in the head, intending to cause his death. The real issue in this appeal is whether it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was liable for the offence of murder as a party under one or more of the provisions in s 7 and s 8 the *Criminal Code* (Qld).

[4] On 26 March 2013, the appellant and her two young children resided with Dhody at a house in Molendinar. Two other people, Donnelly and Stein, also resided in the house. According to the appellant's statement to police dated 28 March 2013, she expected Dhody to be at his office until about 8.00 pm. Telephone intercept records showed that the appellant's mobile phone connected with Gooley's mobile phone three times between 6.24 pm and 7.38 pm. According to a statement given by Dhody dated 31 March 2013, he arrived home at about 8.10 pm. As he walked from his car in the driveway to the front door of his house, he saw a man he did not know (Gooley) wearing a dark t-shirt, dark shorts, leather sports shoes, with short dark brown or black hair, and between 180 and 190 centimetres tall with a solid build. The man was carrying a crowbar about one and a half feet long. Dhody stated to police that the man told him to start walking. After Dhody asked if he had done something wrong and whether they could talk where they were, the man said to Dhody words to the effect of, "Melissa's family has sent me here. You had an argument and I want to make sure it does [not] ever happen again. And anyone who

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1 *SKA v The Queen* (2011) 243 CLR 400, affirming the test stated in *M v The Queen* (1994) 181 CLR 487 and *MFA v The Queen* (2002) 213 CLR 606.

2 RB 774.

owes you money, you need to forget about it." Dhody replied that no one owed him any money except for his friend Rory and that the appellant and he were partners. He asked the man whether Rory had sent him. The man then hit him repeatedly on the head with the crowbar and said, "I don't care. I'm here to do the job."

[5] Dhody fell to the ground. The man continued to hit him with the crowbar, kicked him, rolled him over and tried to hit him again with the crowbar but missed and hit him on the right side of the chest. Dhody stated that he was able to grab hold of the crowbar under his arm. The man said, "The person who sent me is my friend, and I will finish the job. I'm going to kill you." The man let go of the crowbar, picked up a flowerpot base, and threw it at Dhody's head and shoulders. Dhody stated that the appellant came down to the front door, saw him being attacked, and called police while he was still lying on the ground outside the front door and the man was still attacking him. Dhody stated that he maintained his hold on the crowbar and the man pulled him up onto his feet. The man asked him to let the crowbar go, and said he would not hit him and would run. Dhody said he would not let it go and that the police were on their way. Dhody heard a female voice from behind him telling him he was bleeding and to let it go. He let the bar go and the man ran.

[6] A woman riding home from shops heard screaming. She saw Gooley strike Dhody with what she thought was a stick. She telephoned police. She gave a description of the assailant which was consistent with Dhody's description. The sound made by her phone resulted in the assailant turning to face her and saying, "This man hurt my wife" or "ruined my life". This witness saw the appellant through the screen door.

[7] The appellant stated that very soon after 8.00 pm she heard voices from downstairs, followed by sounds consistent with someone being hit. She heard Dhody call out for help, ran down the stairs, and called 000. She stated that when she arrived at the bottom of the stairs and turned the front porch lights on she could see Dhody lying on the ground outside the front door. She also stated that she "saw the male attacker standing to the right of Sam." Dhody used "Sam" as his first name. The appellant stated, "the male attacker was holding a large blue-coloured crowbar". The other end of the crowbar was down under Sam's arm". She heard the attacker tell Dhody to let it go and that he would leave. The appellant stated that when she turned the light on, "I saw the side profile of the male attacker through the right hand glass panel". She described the attacker as being "maybe 175-180 centimetres tall, Caucasian, short brown hair, wearing shorts which I think were black, joggers and a shirt. He didn't look scruffy; he was well groomed, in his mid to late twenties and a little bigger [than] Sam". She stated that she had "never seen this person before".

[8] The appellant stated that after she got off the phone she opened the door and yelled at the attacker to go. The attacker got the crowbar from Dhody and left without acknowledging the appellant. After helping Dhody into the house and locking the door, the appellant asked Dhody what had happened. Dhody told her the attacker had said, "Your family sent me to kill you" and started hitting him with the crowbar. The appellant stated that she told Dhody that it was impossible that the attacker was talking about her family. The appellant told police that she did not know why the attacker might have mentioned her family, it did not make any sense, and her relationship with Dhody was good. She stated that she did not think that Stein had anything to do with the attack and it was not Stein that she saw as the attacker. In a supplementary statement dated 3 April 2013 the appellant stated that she could definitely say that the male person that she saw assaulting Dhody was not

Stein, but that she thought that Stein had something to do with the assault. She stated that she could not offer any evidence to prove it. She did not state any basis for her stated belief that Stein had something to do with the assault. The appellant maintained in a media interview and in statements to other witnesses that she did not know who had attacked Dhody.

[9] Police who arrived in response to the 000 call asked the appellant about an injury to her eye which they observed. The appellant denied having been hit and stated that someone bumped into her at the airport.

[10] DNA matching Gooley's DNA was found on Dhody and his clothes. DNA matching Dhody's DNA was found on a crowbar that was found in a nearby yard months after the assault and given to police. The Prosecution adduced evidence that in the afternoon before the attack Gooley purchased the crowbar. A sales assistant gave evidence that he recalled that the customer who bought the crowbar looked "pretty angry".

[11] A doctor who examined Dhody reported that he had a 10 cm (approximately) laceration to the left side of his head and small lacerations behind that. Those lacerations were sutured. No fractures were revealed by a CT scan.

[12] There was evidence that Dhody became more concerned about security after the assault. Donnelly gave evidence to that effect and that the appellant told everyone to make sure that the windows and doors were locked when they left the house. Groom, a builder who had a business relationship with Dhody and who was supervising the building of a new house at Gilston, gave evidence about conversations between him and Dhody about security at the new house as an extra to the contract. In a statement the appellant gave to police on 5 July 2013 in relation to the murder of Dhody on that day, the appellant said that Dhody had become extremely paranoid and very conscious of his surroundings and personal security after the assault.

[13] The Gilston house was in the appellant's name. The appellant, her young children, Dhody and Donnelly moved into that house on 24 June 2013. Telephone intercept records revealed that there were 25 answered telephone calls and six text messages between the appellant's mobile phone and Gooley's mobile phone between 20 and 30 June 2013. On 30 June 2013, Dhody drove with an employee, Bezemer, to Newcastle for a business trip. Bezemer gave evidence that the trip was planned to occupy a week, but it was cut short because of its lack of success. The decision to return on Thursday 4 July was made in the afternoon of that day. Bezemer was not aware of Dhody telling anybody that the trip was being cut short, except that on the drive home he telephoned the appellant at about 4.30 pm or 5.30 pm and told her.

[14] The telephone intercept records reveal that between 1 and 4 July 2013 there were about 30 communications between the appellant's mobile phone and Gooley's mobile phone. In a text message of 3 July 2013, Gooley referred to having spent the last few days with the appellant. Subsequent text messages suggested that Gooley intended to be with the appellant at the Gilston house on 4 July 2013.

[15] Buchan gave evidence that he was a friend of Gooley's. On 22 June 2013, there was an exchange of text messages between Buchan and Gooley in which Gooley sought to borrow a gun from Buchan for the stated purpose of putting down a sick horse for a friend who had no money. Buchan did not respond to Gooley's last

message to him, in which Gooley asked whether he could borrow the gun. Between 2 and 4 July 2013, there were various text messages and telephone calls between Gooley and one Mylonas, in which Gooley asked Mylonas for a gun and bullets. Mylonas gave evidence that in a separate communication by social media on 2 July 2013, Gooley, who owed Mylonas some money, asked Mylonas if he wanted to earn some $2000. In a telephone conversation Gooley asked Mylonas for a gun. Mylonas said that at a meeting at his house on 2 July 2013 Gooley gave him $700 in $100 notes. It was discussed that, if Mylonas got the gun for Gooley, Gooley would drop the rest of the money off.

[16] The telephone intercept records identify a telephone call from Dhody to the appellant at 3.20 pm on 4 July 2013 (presumably the call during which Dhody told the appellant that he was returning early from his trip). Soon after that call concluded, the appellant's mobile telephone connected with Gooley's mobile telephone for a call duration of 50 seconds. Two or three minutes later, at 3.25 pm, Gooley's mobile phone sent a text message to Mylonas, "Need it now mate. Can I come pick you up to get it please?? It urgent." Gooley rang his father at 5.07 pm. At 5.15 pm Gooley sent a text message to his father saying that he was on his way. Gooley arrived at his house in Lismore at about 5.30 pm. Gooley borrowed a .22 calibre rifle from his father. Gooley's father gave evidence that he gave Gooley a subsonic brand of ammunition which made hardly any noise. Gooley told his father that he was borrowing the rifle to execute a dog that had bitten a flatmate. Gooley's father also gave evidence that Gooley stayed for a couple of hours and then left to drive back to the Gold Coast. There was evidence that the car Gooley may have been driving was recorded as speeding at Clunes, driving North from Lismore towards the Gold Coast, at 7.37 pm. Shortly after 6.30 pm on 4 July, the appellant's mobile phone connected with Gooley's mobile phone. At 7.27 pm Gooley's mobile phone connected with the appellant's mobile phone. Gooley called another person at 9.33 pm when Gooley's mobile phone was in the vicinity of the appellant's house at Gilston. At 11.19 pm on 4 July, Dhody sent a text message from his home to Bezemer.[3] Bezemer had dropped Dhody at his home some time before then; that was the last time anyone other than the appellant saw Dhody alive.

[17] In the appellant's statement to police she stated that: she was asleep when she received a text from Dhody saying that he was 15 minutes away from home; she recalled Dhody turning on the bedroom light and telling her that he had been trying to call her and asking whether she had received his texts; she said she had not, but found her telephone and read the text out; she asked Dhody how the drive was and he responded, "How do you think?"; she woke at 6.30 am the following morning, 5 July 2013; the appellant had slept in one of her children's beds because Dhody was snoring; and when she returned to their bedroom in the morning Dhody woke up but did not say anything apart from telling her to close the bathroom door.

[18] Donnelly gave evidence that he left the house on 5 July at about 6.00 am to go to the gym. That was consistent with a record indicating that he attended the gym at 6.20 am. He said that he returned home at about 7.30 am, as he arrived he saw the appellant driving out of the driveway with her children, and he stopped and paid her some rent. The appellant made statements to similar effect, although she identified the time as being about 7.40 am. The appellant stated that she dropped her children off at the kindergarten at 7.50 am. The kindergarten records indicate that the appellant entered that as the drop off time.

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[3] This evidence was given by a police officer, Zanco, at RB 574.

[19] The appellant stated that as she was driving towards the kindergarten she telephoned Donnelly and asked him if he could bring her iPhone, which was on a charger in the home office, and meet her at a fast food restaurant in Nerang in half an hour. The appellant stated that she did this because she realised she had left the phone behind and if Donnelly brought it to the fast food restaurant, which was on Donnelly's route from the Gilston house to his work, that would save the appellant the time occupied in driving back to the house to collect the phone. The telephone intercept records include a call from the appellant's mobile phone to Donnelly's mobile phone at 7.55 am. Donnelly gave evidence that he left the house between 7.50 am and 8.00 am, after making sure that the front door was closed. Donnelly gave evidence with reference to CCTV footage taken at the fast food restaurant that he was there at 7.57 am and, after having breakfast with the appellant and giving her the mobile phone, he left at about 8.19 am. The appellant stated that she drove from the restaurant to the company office in Southport, arriving there at 9.04 am.

[20] Groom gave evidence that he called the appellant at about 9.00 am after there was no response when he knocked heavily on the front door of the Gilston house. (The telephone intercept records identify the time of this phone call as 8.50 am.)[4] Groom said that the appellant told him that Dhody had come back unexpectedly and she was going to the office to meet him. The appellant stated that she received this phone call from Groom on her way to the restaurant after she had dropped her children off at the kindergarten at 7.50 am.[5] The appellant sent a text to Dhody upon her arrival at the office at 9.04 am asking if he was awake and telling him that she had arrived at the office, Groom had knocked on the front door of the house, and there was no answer.[6] She did not receive any reply.

[21] On 3 and 4 July 2013, the appellant had arranged with Graham, a representative of a window company, to attend at the house at 9.30 am on 5 July because keys for awnings at the house were not working. At 8.58 am on 5 July the appellant called Graham.[7] Graham gave evidence that the appellant said that she would not be at the home. He told her that he was on his way and nearly there. He gave evidence that the appellant asked him either to go inside and have a look at the windows or to leave the keys for the awning windows. Graham said that from memory the appellant mentioned that she had been called into work and had to organise to take the kids to school or day care, or something like that.[8] The appellant referred to a similar conversation about "the key guy" being at the house to drop off the window keys, but she referred to that conversation as having been with Groom after 7.50 am.[9]

[22] The appellant left the office at about 10.30 am,[10] went shopping, and attended to other tasks. She later returned to the office carpark and drove to a shopping centre, where CCTV footage showed her going into various shops. The appellant stated that it was not normal for her to go shopping but that Dhody had told her that she could treat herself because she had done so much work in the house moving and had saved around $600 in cleaning. The appellant did not receive replies to two texts she sent to Dhody in the middle of the day enquiring whether he wanted to catch up for lunch. There was no answer to telephone calls she made to him around the same

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4 RB 822.
5 RB 216.
6 RB 823.
7 RB 822.
8 RB 96.
9 RB 790 at para 92.
10 RB 823.

time. A witness who the appellant had arranged to deliver furniture at the house gave evidence that at about 1.00 pm he knocked on the front door and there was no answer. He thought the house was "fully closed".[11] When he walked between Dhody's car and the garage he saw an unspent round of ammunition, which he picked up and later gave to police.

[23] The appellant made three unanswered telephone calls and sent one text message to Dhody between 3.55 pm and 3.57 pm. Donnelly returned to the Gilston house at about 2.00 pm with his son and a friend of his son. They watched videos until 4.30 pm at the latest, when they left. Their estimates of when the appellant arrived varied between about 3.40 pm and 4.30 pm. The appellant stated that she left the shopping centre to go home around 4.00 pm and arrived home 20 to 25 minutes later.[12] She stated that she parked behind Dhody's car and could see that it had not been moved from where she had parked it the previous day. She stated that it did not occur to her that Dhody might be home because he was usually driven by Bezemer. The appellant described various domestic activities she did in the house. She stated that after Donnelly and the two children left she collected her shopping from the car and went into the master bedroom. She found Dhody still in bed with the doona pulled over his head. She moved the doona and discovered it was stuck to his face. She saw three or four bullet holes on the side of his forehead and felt that his stomach was cold and hard. She called 000 at 4.45 pm or 4.50 pm and reported that she had found Dhody in bed with a number of holes in his face, he had been shot, had holes in his head, and was cold and hard.

[24] A paramedic who attended the scene did not note anything which he thought was out of the ordinary about the appellant's behaviour and described her as "appropriately upset".[13] The appellant told a police officer that she had put her handbag in the bedroom and really wanted her cigarettes.[14] Other police officers, Cross and Zanco, gave evidence that Zanco asked Cross to retrieve the handbag because the appellant had been asking for it.[15] $38,000 and USD$10,100 in cash were found in the appellant's handbag, in a number of different bundles containing many $100 notes. The appellant stated that the money was known only to herself and Dhody. She stated that because they had moved to the new house only on 24 June 2013, they had not yet found somewhere for the money to be kept; she was keeping the money with herself to guard it until they found a secure place to store it.[16] Groom gave evidence that there was a "void area" in the house that could be accessed through the ceiling.[17] Zanco gave evidence that in a conversation he had with the appellant at the house on 15 July 2013 there was reference to the children's wardrobe cupboard being pushed out, there could have been a hidey hole there, and anyone could see that the police had looked in there.[18]

[25] Expert evidence in the Crown case established that a .22 calibre firearm was used to inflict 10 gunshot wounds to the head of the deceased from a distance ranging from the weapon touching the skin of the deceased up to a range of 20 cm. Nine of the 10 spent cartridges had been removed by the offender from the bedroom and one

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11 RB 121.
12 RB 793 at paras 108, 111.
13 RB 136.
14 RB 855.
15 RB 391, 486.
16 RB 798, 799.
17 RB 103-104.
18 RB 527.

was found under the deceased's bed. Another was found on the ground in a garden outside the house adjacent to the room in which the body was found. There was expert evidence to the effect that the cartridge found under the bed and the cartridge found in the garden were discharged by the gun borrowed from Gooley's father (which Gooley's father had retrieved from the place he had hidden it and given to police). There was expert evidence that one of the projectiles found in the deceased was consistent with it having been fired from that gun, and there were insufficient features left on the remaining, damaged projectiles inside the deceased to match them with the gun. DNA found in blood on the rifle barrel matched the deceased's DNA. DNA matching Gooley's DNA was found on the deceased, his clothes, and the bedding. Gooley's fingerprints were found on the inside of the garage door. According to evidence of acoustic tests, the noise of the gun discharging might have been perceived by a person already awake inside the residence, but if the internal doors in the house were closed,[19] the noise of the gun discharging was unlikely to be sufficient to wake a sleeping person inside the residence and a person awake in the residence was unlikely to recognise the noise as a gunshot.

[26] There was no sign of a forced entry into the house. The external doors were all locked (apart from the front door). The windows were shut other than a window which had a security screen. The motor connected to the garage door was not plugged in. Photographs of the inside of the garage included images of the mechanism which allowed the garage door to be unlocked manually from inside the garage. It was not possible to tell from the photographs whether or not that mechanism had been engaged.[20]

[27] In the appellant's statement dated 5 July 2013 she stated that she did not know who could have killed Dhody. She did not mention Gooley to police at any stage in their investigation.[21] The appellant told police that she and Dhody had met at a casino and had started seeing each other shortly afterwards.[22] Other evidence suggested that this was incorrect. The appellant married Beau Shaw in 2004. He gave evidence that they separated in August 2011.[23] He also gave evidence that in 2011 the appellant told him that one of her clients at the brothel where she was employed as a sex worker, Dhody, was very rich, that he would be her last client, and that money he was going to pay her would be used to set up her own business and leave the sex industry. After that conversation the appellant and Dhody embarked on a romantic relationship.

[28] Beau Shaw also gave evidence that at an earlier time, in October 2010, the appellant told him that she wanted to return to the sex work industry. Beau Shaw had earlier become aware that the appellant was in a romantic relationship with Gooley. When Gooley became aware that the appellant was returning to the sex work industry he made several threats to Beau Shaw by text messages; and the appellant was aware of those threats. Beau Shaw also gave evidence that the appellant told him of an occasion when Gooley tracked down a man who, the appellant said, had raped one of her girlfriends. The appellant told Beau Shaw that Gooley had kept that man tied up for a few days to scare him before letting him go out in the bush somewhere. Beau Shaw gave evidence that shortly after their separation the appellant told her that, in

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19 See respondent's outline footnote 167.
20 RB 589.
21 RB 518.
22 RB 775.
23 RB 302.

effect, she would continue to maintain her relationship with Gooley whilst she was in a relationship with Dhody.[24]

[29] There was evidence in the Crown case from various sources that Dhody was violent towards the appellant. For example, Stein gave a statement to police that on one occasion the appellant showed him a video of Dhody punching her whilst she sat in a motor vehicle and on another occasion he observed Dhody kick the appellant to the head. Dhody's former partner, who had lived with Dhody from about 2005 to 2010, gave evidence that in a telephone conversation on 12 March 2013 the appellant told her that Dhody was being physically violent towards her, he hit her, and he kicked her; the appellant also said that she was scared and had told Gooley that Dhody was violent towards her.[25] A witness who had previously worked at the brothel where the appellant had been employed as a sex worker gave evidence that in 2012 she asked the appellant about bruises on her legs. The appellant said that Dhody hit her. When the witness asked the appellant why she did not leave Dhody the appellant replied that there was too much invested in the relationship.

[30] Dhody's former partner gave evidence that the appellant told her that she suspected that Dhody was having an affair with Bezemer; the appellant had seen the two of them kissing in front of her and they went on shopping sprees and had expensive dinners together.[26] In the appellant's statement dated 5 July 2013 she stated that Bezemer had nothing when she came to Dhody and the appellant, Bezemer was now on $900 take home pay, drove a BMW, had an opportunity to travel all around Australia, and had the assistance of the company in obtaining her first home loan. The appellant stated that Bezemer had been a bit secretive and had been becoming a lot closer to Dhody than the appellant thought appropriate. Dhody had spent around $25,000-$30,000 on Bezemer since she had joined the company. The last three campaigns run by the company had been attended by Dhody and Bezemer alone. The appellant stated that she had seen invoices from hotels where Dhody and Bezemer had stayed whilst on campaigns and the rooms they stayed in contained only one bed. Dhody had explained to the appellant that he and Bezemer stayed in one hotel room together to control costs, but he refused to explain why there was just one bed. The appellant stated that Dhody had told her that he was not being unfaithful but the appellant suspected otherwise. Zanco gave evidence that the appellant told her on 7 July 2013, that Dhody had transferred $20,000 into Bezemer's account on 27 June 2013.[27]

[31] In about February or March 2013 Dhody went on a business trip with Bezemer. Bezemer gave evidence that during this trip she overheard an argument in which Dhody berated the appellant and told her that she would be out on the street and a prostitute if it were not for him.

[32] The appellant's father gave evidence that at the appellant's request he sent her an email dated 14 March 2013, which was similar to a document he had given the appellant when she was breaking up with Beau Shaw.[28] The email outlines steps the appellant's father suggested the appellant should take if she separated herself from Dhody. The email includes details about how the appellant should secure her

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24 RB 305.
25 RB 229-230.
26 RB 230-231.
27 RB 520-521.
28 RB 290-291.

assets, notes that the appellant's car and two houses might be at risk of a claim if Dhody could prove an ongoing relationship of six months or more, refers to the possibility of some issues arising about the house currently under construction because of Dhody's relationship with the builder, solicitor and housing firm, and suggests it might be wise for the appellant to seek legal advice to protect her financial position.

[33] Quintili, who employed Gooley and rented a room to him, gave evidence that Gooley stopped working for him three days before Dhody's death. Quintili gave evidence that Gooley did not spend much money and spent money mainly on alcohol. After Dhody's death Gooley paid Quintili two month's rent in advance in cash and bought a boat. Another witness who lived in the same house gave evidence that in early July Gooley also bought a laptop and a bar fridge.[29] Zanco gave evidence that when she searched Gooley's car she found receipts for a variety of cash purchases on 6, 7 and 9 July 2013. Zanco also referred to CCTV footage which showed Gooley at a money exchange on 10 July 2013. A record from the company which operated the money exchange indicated that Gooley then exchanged US$3,000 for the equivalent in Australian currency.

[34] The general manager of the brothel where the appellant had worked from November 2010 until October 2012, Love, gave evidence that a couple of days after Dhody was killed the appellant rang her and said that if the media or the police came to the brothel could she please not say that the appellant had ever worked there.

[35] From the day of the murder, 5 July 2013, there were no communications between the appellant's and Gooley's mobile phones until 20 July 2013. On 9 July 2013, police observed the appellant making a telephone call from a public telephone. Telephone intercept records established that this call was made to Gooley's mobile phone. Police observed the appellant leave the public telephone and drive to Gooley's residence.

[36] On 18 July 2013, the appellant told Zanco that she did not have anything to contribute about the possible identity of, or suspicions about, anyone who was involved in the killing.[30] On 20 July 2013, the appellant sent a message to Gooley with a website address containing a link to an article about the killing which included a comfit made by Dhody of the perpetrator in the assault upon him in March. By 21 July 2013, Gooley was in hospital for the purpose of having a heart transplant. In a telephone conversation on 22 July 2013, the appellant mentioned to Zanco that on the next morning she would be seeing a sick friend who was having an artificial heart put in.[31] On 31 July 2013, Zanco attended the hospital where Gooley was a patient and happened to see the appellant there.[32]

[37] On 18 July 2013, police seized Gooley's motor vehicle. He was not advised of that until 22 July 2013. In a recorded telephone conversation between the appellant and Gooley on 21 July 2013, Gooley informed the appellant that his car had been stolen. Gooley said that this was a good thing. The appellant did not demur.[33] After police informed Gooley that they had seized his car, on 22 July 2013 Gooley disclosed that to the appellant in a telephone conversation.[34] They appeared to regard it as bad

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29 RB 280.
30 RB 528.
31 RB 528.
32 RB 529.
33 Exhibit 66.
34 Exhibit 67.

news. Police found photographs of the appellant at Gooley's residence which showed bruising on her body. Included with the photographs was a form of domestic and family violence protection application and associated literature.[35]

[38] The appellant did not call or give evidence.

The Crown case

[39] Upon the Crown case the appellant was liable for both offences under one or more of sections 7(1)(b), (c) and (d) and section 8 of the *Criminal Code*. The Crown relied upon the same body of evidence as supporting its case under each of those provisions. The Crown also contended that the jury could find the appellant guilty of the murder under s 7(1)(a) upon the footing that she might herself have killed Dhody, but the Crown did not seriously press that case at the trial and did not rely upon it on appeal.

[40] Section 8 of the *Criminal Code* provides:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The Crown identified the alleged unlawful purpose as being "to cause some serious violence to Dhody".[36]

[41] The Crown case under s 7(1)(b) and s 7(1)(c) in relation to the charge of murder was that:

(a) (Section 7(1)(b)) the appellant did an act or made omissions for the purpose of enabling or aiding Gooley to kill or do grievous bodily harm or (s 7(1)(c)) the appellant assisted Gooley to kill or do grievous bodily harm to Dhody;

(b) the appellant did so intending (s 7(1)(b)) to aid Gooley or (s 7(1)(c)) to help Gooley to kill or do grievous bodily harm to Dhody; and

(c) the appellant had actual knowledge or expectation that Gooley intended to kill or do grievous bodily harm to Dhody.[37]

[42] The Crown's primary case, both in relation to the assault and the murder, was that the appellant was liable under s 7(1)(d) as a person who "counsels or procures any other person to commit the offence". In relation to the murder, as the trial judge directed the jury,[38] this case required the prosecution to prove beyond reasonable doubt: that Gooley committed the murder (which was not seriously in issue); that the appellant procured Gooley to commit the murder by successfully persuading Gooley to kill Dhody, thereby bringing about the murder; and that the appellant knew that Gooley intended to cause the death of Dhody or at least cause him grievous bodily harm.

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35 RB 530.
36 RB 676.
37 RB 673
38 RB 671.

The appellant's argument

[43] The appellant argued that the evidence in the Crown case did not exclude an innocent hypothesis that Gooley unilaterally decided to assault Dhody and subsequently to kill him. Alternatively, the appellant argued that the evidence in the Crown case did not exclude the innocent hypothesis that the appellant did not know that Gooley intended to kill or do grievous bodily harm and (in terms of s 8 of the *Criminal Code*) the murder was not an objectively probable consequence of the alleged plan or common unlawful purpose to which the appellant was a party. The appellant argued that the critical defect in the prosecution case was the absence of any direct evidence about the content of any agreement between the appellant and Gooley; any such plan might have been that Gooley would only assault Dhody in the same way as he had done on the first occasion, which did not result in grievous bodily harm or any serious injury.

[44] The appellant argued that in those circumstances it was not open to the jury to be satisfied beyond reasonable doubt that the appellant had aided or done any act for the purpose of aiding Gooley to murder Dhody, knowing that Gooley intended at least to do Dhody grievous bodily harm, or that the appellant had procured Gooley to kill Dhody with the same knowledge, or that the appellant had become a party to a common unlawful purpose the execution of which involved murder as a probable consequence.

[45] In support of these arguments the appellant emphasised the following points:

(a) There was no direct evidence of the appellant aiding or procuring Gooley to assault or kill Dhody.

(b) Upon the evidence in the Crown case, the killing could have occurred either before 7.26 am (23 minutes before Gooley's 7.49 am telephone call from Robina) or after 8.12 am (23 minutes after that telephone call) until about 8.45 am. It was unlikely that the killing would have occurred at the earlier time, when the appellant and her two young children were in the house. If the killing occurred at the later time, the Crown could not rely upon the presence of the appellant as amounting to aiding or otherwise implicating the appellant in the killing because the evidence suggested she had left home at around 7.40 am.

(c) If the jury concluded that the appellant knew that it was Gooley who assaulted Dhody with a crowbar in the earlier incident, it did not follow that murder was a probable consequence of the appellant's participation in a plan or common purpose involving Gooley assaulting Dhody, particularly because the force used by Gooley in the earlier incident did not cause serious injuries.

(d) It could not be assumed that Gooley needed the appellant's cooperation to gain access to the house because the Crown did not exclude the possibility that the garage door was unlocked and the live round of ammunition found near the garage door was arguably consistent with Gooley having bent down to open that door.

(e) The appellant's telephone call on 4 July to Gooley within a few minutes of Dhody having told the appellant that he was returning early from his trip might have been made merely for the purpose of the

appellant telling Gooley not to visit that evening as Gooley had intended.

(f) The evidence of motive was weak. The appellant owned two houses that were heavily encumbered, Dhody was bankrupt and had no substantial assets, he was the driving force behind the business and the appellant did not have the experience to conduct the business, and the cars owned by the companies would be repossessed by the finance companies upon default. The appellant argued that at most she stood to avoid any challenge to her retention of the $77,000 in a bank account in her own name together with the cash found in her possession after the killing.

(g) If the appellant wished to separate from Dhody, she had the benefit of practical advice in the email from her father and she could seek a legal remedy for the exclusion of Dhody from the house which she owned together with remedies under the *Domestic and Family Violence Protection Act* 2012 (Qld).

(h) The hypothesis that Gooley acted unilaterally was supported by circumstances that by the time of the murder he was facing the prospect of imminent death from a heart condition, he loved the appellant and was protective of her, he was aware that Dhody had been violent towards the appellant, it was unlikely that the appellant would be a party to a plan for Gooley to assault Dhody at the house where she would likely be a witness and be spoken to by police, and if her intention was to remain in occupation of the house it was surprising that the killing would take place in her bedroom and involve the extensive blood staining which occurred there and the inevitability that the appellant would be spoken to by police.

Consideration

[46] As was submitted for the respondent, in a circumstantial case such as this all the circumstances must be considered together and not in a piecemeal way.[39] Substantially for the reasons identified by the respondent in its argument, I conclude that it was reasonably open to the jury to find that when all of the circumstances relied upon in the Crown case were considered together, the Crown had proved beyond reasonable doubt that the appellant was guilty of both offences.

[47] The appellant's argument does not take into account the significance of the evidence that allowed the jury to conclude beyond reasonable doubt that the appellant knew that it was Gooley who attacked Dhody on 26 March 2013. The assault occurred on the porch just outside the front door, the light was on, the appellant's own statements to police conveyed that she had a clear view of the assailant and could give a detailed description of him, and the appellant had known Gooley intimately for many years.

[48] It was open upon the evidence for the jury to accept the prosecutor's submission that the appellant deliberately lied out of a consciousness of her guilt of knowing participation in the murder, both when she stated to police and others that she did not know who had assaulted Dhody or who had killed him and when she omitted to

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39 *R v Hillier* (2007) 228 CLR 618 at [48].

mention her relationship with Gooley when she spoke to the police who attended the scene of the killing and later made her apparently comprehensive statement to police about the circumstances surrounding the events of 5 July 2013. At the trial, the appellant identified as innocent reasons why she might have failed to identify Gooley that they were in a relationship, she would have known that Gooley assaulted Dhody in an effort to protect her, the appellant was stuck with the lie once she failed to identify Gooley in her initial statements to police, she may have wished simply to conceal her affair with Gooley from Dhody, and her lie might also have been driven by a concern that if she identified Gooley his domestic violence towards her would be revealed and she would become a police suspect in relation to both offences.[40] Having regard to the circumstances that the appellant saw Gooley violently assaulting her partner with a crowbar just outside the front door of the house in which they lived with the appellant's young children, the jury could readily reject any innocent explanation for the initial lie. The jury could reason that, in light of the appellant's knowledge that Gooley had committed the earlier offence, on any view the appellant must have believed that Gooley was the killer. That would add yet further support for a conclusion that there was no innocent explanation for the appellant's repetition of the lie after the killing.

[49] The appellant's argument also does not take into account the significance of the coincidence that: each attack occurred shortly after the deceased arrived home; on each occasion it was not to be expected that Gooley would know when Dhody would be at the house unless the appellant told him; the appellant was aware of the time when the deceased would be arriving home on each occasion; and on each occasion there were communications between the appellant and Gooley shortly before the attack. The possibility that there were explanations for those communications which did not implicate the appellant in knowing participation in the murder was for the jury to consider, but the jury could consider it much more likely that the appellant gave Gooley information about the appellant's movements to assist Gooley in committing both offences.

[50] The evidence also justified the jury in concluding that the appellant left a door or window unlocked to assist Gooley in entering the house to kill Dhody. It seems very unlikely that Gooley walked around the house in daylight carrying a rifle whilst he looked for an unlocked door or window and he fortuitously discovered that the garage door was unlocked. If the appellant did enter by the garage door, the evidence of Dhody's strong, expressed concerns about his personal security at the Gilston house makes it seem unlikely that he or another member of the household had inadvertently left the garage door unlocked. The jury was also not obliged to act upon a speculation that at a time before the killing when Gooley was visiting the appellant in the house, without the appellant's knowledge Gooley discovered that the garage door was not engaged in the locked position or he disengaged the mechanism.

[51] Many other circumstances also pointed to the appellant having been a knowing participant in the murder of Dhody:

(a) The evidence was consistent with a conclusion that the appellant contrived to ensure that Donnelly was out of the house to avoid Gooley being detected. The appellant telephoned Donnelly at about 7.55 am, whilst he was at the house as the appellant would have expected, and asked

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40 RB 659.

him to bring her second mobile telephone from an office in the house to a restaurant in half an hour (which he did, leaving the house no later than about 8.00 am). Although the appellant stated she made this request because she wanted to be in the office on time, reference to a map reveals that the distance between the restaurant and the house was only a few kilometres.[41] Far from being in a hurry to get to work, the evidence established that the appellant stayed at a restaurant for about 20 minutes, of which she spent longer than 10 minutes in the carpark talking to Donnelly.

(b) The appellant stayed out of the house for much of the day, including during a long period of uncharacteristic shopping, with the apparently predictable result that the body was not discovered for many hours after the death, thereby facilitating the prospect that Gooley might escape detection.

(c) It was open for the jury to consider it strange that when the appellant returned to house in the afternoon of 5 July 2013, about 45 minutes elapsed before she called 000, in circumstances in which she had not been able to contact Dhody by ringing him or sending him messages during the day and his car remained in the driveway of the house when she returned home. The jury could consider that the appellant's conduct was explicable by her knowledge that Dhody was dead long before she reported the death.

(d) In light of the evidence that there was an area built into the house in which the large amounts of Dhody's cash kept in the house could be hidden, the jury could consider that the appellant's explanation for having the cash in her handbag was unpersuasive.

(e) The circumstance that each of Gooley and the appellant ceased to contact the other by mobile telephone on and from the day of the killing after having had very frequent mobile phone contact up until the day before the killing, suggested that this was part of a plan between them which was designed to avoid discovery of their roles in the murder.

(f) This was a gruesome killing of the appellant's partner in which the intent to kill must have been obvious when the appellant saw the state of the body and the bedroom. If, as the jury could find, the appellant believed that Gooley was the killer, it is difficult to accept that she would have telephoned or visited him at his home or in hospital, or at all, if she had not connived in the murder of Dhody.

(g) The jury could readily consider that it was not a coincidence that, upon evidence in the Crown case, Gooley gave Mylonas $700 in one hundred dollar notes on 2 July 2013 in connection with Gooley's request for a gun, at a time when the appellant had ready access to Dhody's numerous $100 notes kept in the Gilston house, Gooley embarked upon unusual expenditure around about the time of the killing, and five days after the killing Gooley exchanged US dollars into Australian currency in circumstances in which the appellant had access to Dhody's US dollars kept in the Gilston house.

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41 Exhibit 72.

(h) That the appellant misled the police about the circumstances in which she met the deceased and that, within days of the killing, the appellant asked the manager of the brothel where the appellant had worked and had met Dhody not to tell police or media that she had worked as a sex worker, could reasonably be understood by the jury as an attempt to conceal from police that the real reason why she was in a relationship with Dhody was to benefit financially. The possibility that the appellant was instead concerned only to avoid adverse publicity or false suspicion falling upon her did not preclude the jury taking these circumstances into account as support for the Crown case.

(i) The evidence that the appellant did not demur from the Gooley's suggestion that the apparent theft of Gooley's car was a favourable development and she was disappointed when they discovered the car had not been stolen could be understood as suggesting that the appellant knew that Gooley had used his car in the killing.

[52] The evidence allowed the jury to conclude that the appellant had motives for killing Dhody:

(a) Upon statements attributed to the appellant, the jury readily could conclude that the appellant believed that Dhody was developing a romantic relationship with Bezemer.

(b) There was ample evidence that Dhody was violent and abusive towards the appellant.

(c) The jury could find that the appellant embarked upon the relationship with Dhody in her own economic interests, the email her father sent to her indicated that she contemplated separating from Dhody, the same email warned her of potential economic disadvantages if Dhody established that they had been in an ongoing relationship of at least six months, and the appellant also would benefit from the death of Dhody at least to the extent of the unusually large amounts of the cash which he concealed in the house.

[53] The circumstances which the appellant emphasised, including that Gooley loved the appellant, sought to protect her, and was facing a prospect of imminent death from his heart condition, were matters for the jury to consider, but whether considered individually or together those circumstances do not detract from the conclusion that this was a strong circumstantial case of murder. The combination of the many circumstances pointing to the appellant's guilt of the offences charged against her require the conclusion that each of the jury's verdicts was reasonably open upon the whole of the evidence.

Proposed order

[54] I would dismiss the appeal.

[55] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[56] **PHILIP McMURDO JA:** The appellant was convicted of two offences, one of assault occasioning bodily harm in March 2013 and the other of murder committed in July 2013. Her appeal against conviction challenges only the murder conviction, the Notice of Appeal stating, as the sole ground of appeal, that "the verdict of guilty

on the count of murder … is unreasonable." I agree with Fraser JA that the appeal should be dismissed.

[57] Although there is no appeal against the other conviction, the respondent's argument appeared to address also the reasonableness of that verdict. It is unnecessary to consider the reasonableness of a verdict which is not challenged by an appeal. And the appellant's conviction of murder was justified by circumstances apart from the fact, as the jury found, that she had been a party to the attack upon the same victim a few months earlier. Nevertheless, as Fraser JA has explained, it was open to the jury to conclude that the appellant lied to police, after the murder, about whether she knew who had attacked the victim in the March incident and to use that as evidence of a consciousness of her guilt of murder.

[58] One of the arguments made by the prosecution at the trial and on this appeal was that Gooley had been able to enter the house ahead of his shooting the victim, in circumstances where that entry must have been facilitated by the appellant. The evidence strongly indicated that Gooley had entered through the garage door: a live round of ammunition was found immediately outside the door, Gooley's fingerprints were found on the inside face of the door and there was evidence that all other entrances to the house were locked. The garage door was not engaged for electronic operation, meaning that it was to be opened from the outside or the inside by hand and without any key. It appears that there was no lock on the door between the garage and the interior of the house. The evidence of Donnelly was that the garage was not being used to house cars at this stage. The house had been occupied only for a week or so and he agreed that the garage was being used to house a lot of material which was then being moved into the house.[42] Photographs of the garage confirmed that evidence. Donnelly also testified that within the days preceding the murder, he had seen the appellant and a man "cleaning up in the garage"[43] and, at the same time, he saw a car the description of which corresponded with Gooley's car.

[59] From this evidence, it was possible that the garage door was disengaged during the period when the garage was still being used by the builders. It was also possible that in his visits to the house in the few days prior to the murder, Gooley came to know that the garage door was disengaged and that it could be used to gain access to an otherwise locked house. I agree that it was unlikely that Gooley went to the house carrying a rifle without being confident that he could enter without any warning to his victim. But he may have known of the means of entry without any assistance from the appellant.

[60] The matter just mentioned was but one element of a circumstantial case. Save in that respect I agree with the reasons of Fraser JA. The other circumstances as analysed by Fraser JA, in combination, left it open to the jury to convict the appellant of murder.

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42 RB 201.
43 RB 197.